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Nos. 14-556, 14-562, 14-571 and 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FAMILY LAW SCHOLARS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. State Family Laws Support The Emotional And Economic Unity Of Married Couples And Have Never Limited Marriage To Those Who Can Procreate 3

A. State laws demonstrate that encouraging a strong spousal relationship is a defining purpose of marriage 4

B. State laws demonstrate that procreation is not the defining purpose of marriage 8

II. State Family Laws Recognize Multiple Ways To Establish Legal Parent-Child Relationships And Do Not Privilege Biological Parents Over Other Legal Parents 11

A. State laws permit and protect non-biological parent-child relationships established through adoption, assisted reproduction, and other ties 12

B. State laws do not privilege biological parent-child relationships over other types of legal parent-child relationships 17

III. State Marital, Parentage, And Custody Laws Have Abandoned Gender Distinctions And Do Not Privilege "Gender-Differentiated" Parenting 18

A. States have abandoned marital, parentage, and custody laws based on gender stereotypes 19

B. State laws do not and cannot limit marriage to those who parent according to prescribed gender norms 24

1. States do not limit marriage to those who satisfy specific parental norms 24

2. States cannot enforce gender-based parental norms 26

IV. State Family Laws Recognize That It Is Impermissible To Punish Children To Influence The Behavior Of Adults 29

A. State laws reflect that it is impermissible to punish children to influence parental behavior 29

B. The marriage bans punish children raised by same-sex couples 31

CONCLUSION 34
APPENDIX A 1a

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Adoptive Couple v. Baby Girl,
570 U.S. ___ (2013) 16

Astrue v. Capato,
132 S. Ct. 2021 (2012).....11

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001).....24

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2013).....26

Caban v. Mohammed,
441 U.S. 380 (1979).....28

Califano v. Goldfarb,
430 U.S. 199 (1977).....27

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985).....24

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014).....*passim*

DeBoer v. Snyder,
973 F. Supp. 2d 757 (E.D. Mich. 2014) 25, 26

Eisenstadt v. Baird,
405 U.S. 438 (1971).....10, 17

Frontiero v. Richardson,
411 U.S. 677 (1973).....27

Gomez v. Perez,
409 U.S. 535 (1973).....31

Griswold v. Connecticut,
381 U.S. 479 (1965).....10

Kirchberg v. Feenstra,
450 U.S. 455 (1981).....27

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014).....18, 26

Lawrence v. Texas,
539 U.S. 558 (2003).....11

Lehr v. Robertson,
463 U.S. 248 (1983).....15, 16

Levy v. Louisiana,
391 U.S. 68 (1968).....30

Meyer v. Nebraska,
262 U.S. 390 (1923).....28

Michael H. v. Gerald D.,
491 U.S. 110 (1989).....14, 15

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982).....28

Orr v. Orr,
440 U.S. 268 (1979).....18, 27

Palmore v. Sidoti,
466 U.S. 429 (1984).....27

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010).....26

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925).....28

Quilloin v. Walcott,
434 U.S. 246 (1978).....15

Smith v. O.F.F.E.R.,
431 U.S. 816 (1977).....12

Stanley v. Illinois,
405 U.S. 645 (1972).....27

Stanton v. Stanton,
421 U.S. 7 (1975).....28

Trammel v. United States,
445 U.S. 40 (1980).....5

Trimble v. Gordon,
430 U.S. 762 (1977).....30

Troxel v. Granville,
530 U.S. 57 (2000).....28

Turner v. Safley,
482 U.S. 78 (1987).....7, 8

United States v. Virginia,
518 U.S. 515 (1996).....27

United States v. Windsor,
133 S. Ct. 2675 (2013).....8, 26, 29

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972).....30, 34

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975).....27

Wolf v. Walker,
766 F.3d 648 (7th Cir. 2014).....26

Zablocki v. Redhail,
434 U.S. 374 (1978).....25

State Cases

Atkinson v. Atkinson,
408 N.W.2d 516 (Mich. Ct. App. 1987) 14

Basham v. Wilkins,
851 S.W.2d 491 (Ky. Ct. App. 1993).....31

Boone v. Ballinger,
228 S.W.3d 1 (Ky. Ct. App. 2007).....14

Bowen v. Kil-Kare, Inc.,
585 N.E.2d 384 (Ohio 1992) 5

In re Dearing,
648 N.E.2d 57 (Ohio 1994) 16

Elisa B. v. Superior Court,
117 P.3d 660 (Cal. 2005).....13

Ex parte Devine,
398 So.2d 686 (Ala. 1981) 28

Frazier v. Goudschaal,
295 P.3d 542 (Kan. 2013) 13

Goodridge v. Dep't of Pub. Health,
798 N.E.2d 941 (Mass. 2003).....33

In re Guardianship of Madelyn B.,
98 A.3d 494 (N.H. 2014) 13

Ireland v. Smith,
547 N.W.2d 686 (Mich. 1996) 22

Krieger v. Krieger,
81 P.2d 1081 (Idaho 1938).....21

Lapides v. Lapides,
171 N.E. 911 (N.Y. 1930).....9

Leguillon v. Leguillon,
707 N.E.2d 571 (Ohio Ct. App. 1998).....14

Linda R. v. Richard E.,
162 A.D.2d 48 (App. Div. 1990).....23

Mahle v. Mahle,
500 N.E.2d 907 (Ohio Ct. App. 1985).....7

In re Marriage Cases,
183 P.3d 384 (Cal. 2008).....8, 33

In re Mullen,
953 N.E.2d 302 (Ohio 2011) 15

In re Nicholas H.,
46 P.3d 932 (Cal. 2002).....15

In re Parentage of Robinson,
890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005).....13

People v. Wallace,
434 N.W.2d 422 (Mich. Ct. App. 1988) 20

Picklesimmer v. Mullins,
317 S.W.3d 569 (Ky. 2010) 15

Preston v. Smith,
293 S.W.2d 51 (Tenn. Ct. App. 1955).....20

Pusey v. Pusey,
728 P.2d 117 (Utah 1986).....21

S. Ry. Co. v. Sanders,
246 S.W.2d 65 (Tenn. 1952) 31

Shineovich v. Shineovich,
214 P.3d 29 (Or. Ct. App. 2009) 13

Sinicropi v. Mazurek,
729 N.W. 256 (Mich. Ct. App. 2006).....14

Tuter v. Tuter,
120 S.W.2d 203 (Mo. Ct. App. 1938) 22

Varnum v. Brien,
763 N.W.2d 862 (Iowa 2009) 25

Waite v. Waite,
64 S.W.3d 217 (Tex. App. 14th Dist. 2001) 7

Welch v. Welch,
195 S.W.3d 72 (Tenn. Ct. App. 2005) 14

Federal Statutes

Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) 23

State Statutes

Ariz. Rev. Stat. § 25-101(B) 10

D.C. Code § 16-909(e)(1) 13

13 Del. C. § 8-703 13

750 Ill. Comp. Stat. Ann. 5 § 212(a)(4) 10

Ind. Code Ann. § 31-11-1-2(2) 10

Ky. Rev. Stat. § 141.180 5

Ky. Rev. Stat. § 199.470 12

Ky. Rev. Stat. § 199.470(2) 32

Ky. Rev. Stat. § 311.631 32

Ky. Rev. Stat. § 311.631(1)(c) 5

Ky. Rev. Stat. § 342.750 5

Ky. Rev. Stat. § 381.050 5

Ky. Rev. Stat. § 391.010(4) 6, 21

Ky. Rev. Stat. § 391.010, *et seq.* 32

Ky. Rev. Stat. § 391.105 31

Ky. Rev. Stat. § 402.005 6

Ky. Rev. Stat. § 402.010 9

Ky. Rev. Stat. § 402.020(1)(b) 9

Ky. Rev. Stat. § 402.030 9

Ky. Rev. Stat. § 403.025 7

Ky. Rev. Stat. § 403.140 21

Ky. Rev. Stat. § 403.160 21

Ky. Rev. Stat. § 403.170 21

Ky. Rev. Stat. § 403.190 .....6, 21

Ky. Rev. Stat. § 403.200 .....6, 21

Ky. Rev. Stat. § 403.212 23

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Ky. Rev. Stat. § 405.020 32

Ky. Rev. Stat. § 411.130 32

Ky. Rev. Stat. § 411.145 5

Ky. Rule. Evid. § 504 5

Mich. Comp. Laws § 199.470 12

Mich. Comp. Laws § 205.201 5

Mich. Comp. Laws § 205.202 5

Mich. Comp. Laws § 333.2824(6) 13

Mich. Comp. Laws § 418.321 5

Mich. Comp. Laws § 481.331 5

Mich. Comp. Laws § 551.3 9

Mich. Comp. Laws § 551.4 9

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Mich. Comp. Laws § 551.103 9

Mich. Comp. Laws § 552.6 7

Mich. Comp. Laws § 552.11 21

Mich. Comp. Laws § 552.13 21

Mich. Comp. Laws § 552.18 ..... 6, 21

Mich. Comp. Laws § 552.19 21

Mich. Comp. Laws § 552.23 ..... 6, 21

Mich. Comp. Laws § 552.605 23

Mich. Comp. Laws §§ 557.21-557.28 20

Mich. Comp. Laws § 557.71 5

Mich. Comp. Laws § 557.81 5

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Mich. Comp. Laws § 600.2922 .....5, 32

Mich. Comp. Laws § 700.2102 .....6, 21

Mich. Comp. Laws § 700.2103 32

Mich. Comp. Laws § 700.2114 31

Mich. Comp. Laws § 700.5301 5

Mich. Comp. Laws §§ 710.24(1)-(2) 32

Mich. Comp. Laws § 710.60(2).....12

Mich. Comp. Laws § 722.21, *et seq.* 22, 31

Nev. Rev. Stat. Ann. § 126.670.....13

N.D. Cent. Code Ann. § 14-20-61.....13

N.H. Rev. Stat. Ann. § 168-B:2.....13

N.M. Stat. Ann. § 40-11A-703.....13

Ohio Rev. Code § 145.43 5

Ohio Rev. Code §§ 145.45–46.....5

Ohio Rev. Code § 742.37 5

Ohio Rev. Code § 1337.16(D)(1)(b)(ii) 5

Ohio Rev. Code § 2105.06 32

Ohio Rev. Code §§ 2106.01, *et seq*.....6, 21

Ohio Rev. Code § 2125.02 32

Ohio Rev. Code § 2151.231 31

Ohio Rev. Code § 2307.09 20

Ohio Rev. Code § 2317.02 5

Ohio Rev. Code § 2945.42 5

Ohio Rev. Code § 3101.01(A) 9

Ohio Rev. Code § 3103.03 .....5, 20, 22, 23

Ohio Rev. Code § 3103.04 20

Ohio Rev. Code § 3103.07 20

Ohio Rev. Code § 3103.08 20

Ohio Rev. Code § 3105.01 21

Ohio Rev. Code §§ 3105.01(A)-(K) 6

Ohio Rev. Code § 3105.18 .....6, 21

Ohio Rev. Code § 3105.18(C) 21

Ohio Rev. Code § 3105.18(C)(2) 20

Ohio Rev. Code § 3105.31 9

Ohio Rev. Code § 3107.03(D)(1) 32

Ohio Rev. Code § 3107.15 12

Ohio Rev. Code § 3107.081(E) 12

Ohio Rev. Code § 3109.03 22

Ohio Rev. Code § 3109.04 22

Ohio Rev. Code § 3111.01 31

Ohio Rev. Code § 3111.01(B) 31

Ohio Rev. Code § 3111.95(A) 13

Ohio Rev. Code § 4123.59 5

Ohio Rev. Code § 5747.01 6

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Tenn. Code Ann. § 20-5-106.....32

Tenn. Code Ann. § 24-1-201.....5

Tenn. Code Ann. § 25-1-106.....5

Tenn. Code Ann. § 31-2-104.....6, 21

Tenn. Code Ann. § 31-2-105.....32

Tenn. Code Ann. § 36-1-102(15)(B) 12

Tenn. Code Ann. § 36-2-316.....31

Tenn. Code Ann. § 36-3-101.....9

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Tenn. Code Ann. § 36-3-105.....9

Tenn. Code Ann. § 36-3-504.....20

Tenn. Code Ann. § 36-3-505.....5

Tenn. Code Ann. § 36-4-101.....21

Tenn. Code Ann. § 36-4-101 (a)(2)-(15) 6

Tenn. Code Ann. § 36-4-103.....21

Tenn. Code Ann. § 36-4-121.....6

Tenn. Code Ann. § 36-5-101.....6, 21, 23, 2

Tenn. Code Ann. § 36-5-121.....6, 21

Tenn. Code Ann. § 36-6-101.....32

Tenn. Code Ann. § 36-6-101(d) (2001).....22

Tenn. Code Ann. § 36-6-103.....32

Tenn. Code Ann. § 50-6-210.....5

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Tenn. Code Ann. § 67-8-302.....6

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Wis. Stat. Ann. § 765.03(1) 10

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Constitutional Provisions

Fourteenth Amendment 1

Mich. Const. Article X, § 1 20

Other Authorities

Adoption Law & Practice (J.H. Hollinger ed. 1988 & supp. 2014) 12, 16

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—seventy four scholars of family law[2]—respectfully submit this brief in support of Petitioners. The two questions presented here concern whether the Fourteenth Amendment requires a state to license or recognize a marriage between two people of the same sex. *Amici* have substantial knowledge of, and experience with, the state family laws that address marriage, parentage, and the well-being of children. Our brief demonstrates that the rationales proposed by Respondents for declining to license or recognize same sex marriages fundamentally conflict with basic family laws and policies in every state.

SUMMARY OF ARGUMENT

Kentucky, Michigan, Ohio, and Tennessee ban same-sex couples from marriage and deny recognition to marriages that same-sex couples enter into elsewhere ("marriage bans"). In defending the marriage bans, these states and their *amici* (collectively "ban defenders") rely on two primary arguments: first, that a core, defining element of marriage is the possibility of biological, unassisted procreation; and second, that the "optimal" setting for raising children is a home with their married, biological moth-

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[1] This brief is filed with written consent of the Petitioners and under Respondents' blanket consent. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Amici* professors are listed in Appendix A.

ers and fathers. But the family laws that govern marital and parental relationships *in these very states*, as well as in the rest of the country, tell a different story.

No state has ever limited marriage to couples who can demonstrate that they have procreative capacity and desire. Instead, in these four states and elsewhere, the state family laws that govern marriage recognize that couples marry for many reasons, including public acknowledgement of their private choice to share their lives with someone they love and to enter a legally binding union that confers hundreds of mutual rights and obligations. These rights and obligations help the couple care for each other, as well as their children (if any), regardless of how those children were conceived.

State family laws that govern the parent-child relationship also refute the "optimal parenting" argument. These laws do not privilege parenting by biological parents who parent in "gender differentiated" ways over other forms of parenting. States afford full parental rights to legal parents who have no biological or genetic ties to a child. In many circumstances, a biological or genetic tie is neither necessary nor sufficient to establish a legal parent-child relationship. State family laws also reject once prevalent notions that a parent's sex or gender is legally relevant to determinations of a child's best interests. Moreover, states exclude no other couples from marriage based on a belief that they will provide a suboptimal setting for raising children.

Finally, state family laws recognize that it is unconstitutional to punish children to influence the be-

havior of adults. Yet the marriage bans do just this. They deprive the children of same-sex couples of valuable governmental, social, and personal benefits in the name of incentivizing others to be "ideal" parents or to have more children.

The marriage bans cannot stand.[3]

ARGUMENT

I. State Family Laws Support The Emotional And Economic Unity Of Married Couples And Have Never Limited Marriage To Those Who Can Procreate.

In Kentucky, Michigan, Ohio, and Tennessee, as in every other state, couples get married for any number of reasons, including a desire for public acknowledgment of their private choice to share their lives with someone they love and to enter a legally binding union that confers enduring, mutual rights and obligations. State family laws reflect that providing a sustaining environment for a couple is a fundamental purpose of marriage independent of whether a couple has or intends to have children. These laws provide married couples with valuable legal protections and hundreds of state and federal benefits that make it easier for spouses to support each other during life and in death. And state divorce laws enable spouses to end a marriage whenever their personal relationship ends.

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[3] Although *Amici* agree with Petitioners that the marriage bans should be subject to heightened scrutiny, the ban is unconstitutional under any standard of review.

Ignoring this state law background, the ban defenders argue that excluding same-sex couples from marriage is justified because such couples lack "procreative capacity" and marriage has always been linked to procreation. Some ban defenders argue that marriage, by definition, is limited to couples who have the potential to engage in unassisted, biological procreation. *See, e.g.*, Brief *Amicus Curiae* Catholic Conference of Ohio In Support of Appellant at 6, *Henry v. Himes*, 772 F.3d 388 (6th Cir.). Other ban defenders argue that the core purpose of marriage is to channel heterosexual irresponsible couples' "procreative urges" into marriage. *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014). Under both articulations, the core element or purpose of marriage relates to unassisted, biological procreation. The laws of no state reflect this limited understanding of marriage and its purposes. Any effort to restrict marriage only to those couples who can biologically procreate without assistance would also be constitutionally impermissible.

A. State laws demonstrate that encouraging a strong spousal relationship is a defining purpose of marriage.

In Kentucky, Michigan, Ohio, and Tennessee, as in every other state, the laws that establish marital rights and responsibilities enable spouses to protect and foster their personal, intimate, and mutually dependent relationship to one another. Some of these laws help married couples care for one another, including the rights to make healthcare deci-

sions,[4] secure workers' compensation and pension benefits,[5] pursue claims for loss of consortium,[6] and invoke testimonial privileges.[7]

Other state laws facilitate the economic interdependence of the married spouses. Many common-law states, including Kentucky, Michigan, and Tennessee, permit spouses to own property as tenants by the entirety, which gives each spouse an equal, undivided ownership interest.[8] During marriage, spouses have mutual rights and support obligations to one another.[9] They may file their taxes as a married couple and enjoy various state tax benefits.[10]

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[4] *See, e.g.*, Ky. Rev. Stat. § 311.631(1)(c); Mich. Comp. Laws § 700.5301; Ohio Rev. Code § 1337.16(D)(1)(b)(ii); Tenn. Code Ann. § 68-11-1806(c)(3)(A).

[5] *See, e.g.*, Ky. Rev. Stat. § 342.750; Mich. Comp. Laws §§ 418.321, 481.331; Ohio Rev. Code §§ 145.43, 145.45–46, 742.37, 4123.59; Tenn. Code Ann. § 50-6-210.

[6] *See, e.g.*, Ky. Rev. Stat. § 411.145; Mich. Comp. Laws § 600.2922; *Bowen v. Kil-Kare, Inc.*, 585 N.E.2d 384, 391 (Ohio 1992) (noting well-established tort); Tenn. Code Ann. § 25-1-106.

[7] *See* Ky. R. Evid. § 504; Mich. Comp. Laws § 600.2162; Ohio Rev. Code §§ 2317.02, 2945.42; Tenn. Code Ann. § 24-1-201. The Federal Rules of Evidence also recognize the common-law rule that spouses cannot be compelled to testify against one another, furthering "the important public interest in marital harmony." *Trammel v. United States*, 445 U.S. 40, 53 (1980).

[8] *See, e.g.*, Ky. Rev. Stat. § 381.050; Mich. Comp. Laws §§ 557.71, 557.81; Tenn. Code Ann. §§ 66-1-109, 36-3-505.

[9] *See, e.g.*, Ky. Rev. Stat. § 402.005 ("community of the duties" mutually owed between spouses); Ohio Rev. Code §§ 3103.03 (spousal support).

[10] *See* Ky. Rev. Stat. § 141.180 (joint filing); Mich. Comp. Laws §§ 205.201, 202 (spousal transfer tax exemptions); Ohio

Upon divorce, the parties have a right to an equitable or equal share of the marital property[11] and to alimony.[12] And upon death, the spouses have a right to intestate succession[13] and may not be disinherited if there is a will.[14] These laws may relieve the state of the obligation to care for some individuals who might otherwise become unable to support themselves.

State laws governing divorce confirm that the relationship between spouses is a defining feature of marriage. In the past, when a marriage was dissolved, fault-based divorce laws focused on spousal misconduct that harmed the spousal relationship, such as adultery, cruel and inhuman treatment, or desertion.[15] Today, every state provides at least one

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Rev. Code § 5747.01, 5747.05; Tenn. Code Ann. §§ 67-8-102, 67-8-302, 67-8-305, 67-8-314 (inheritance and gift tax benefits for spouses).

[11] *See, e.g.*, Ky. Rev. Stat. § 403.190; Mich. Comp. Laws § 552.18; Ohio Rev. Code § 3105.18; Tenn. Code Ann. §§ 36-5-101, 36-4-121.

[12] *See, e.g.*, Ky. Rev. Stat. § 403.200; Mich. Comp. Laws § 552.23; Ohio Rev. Code § 3105.18; Tenn. Code Ann. § 36-5-121.

[13] *See, e.g.*, Ky. Rev. Stat. § 391.010(4); Mich. Comp. Laws § 700.2102; Ohio Rev. Code §§ 2106.01, *et seq.* (surviving spouse's rights in probate); Tenn. Code Ann. § 31-2-104.

[14] *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. Davis L. Rev. 129, 160 (2008) ("With the exception of Georgia, every American state limits the ability of a testator to disinherit a surviving spouse.").

[15] *See, e.g.*, Ohio Rev. Code §§ 3105.01(A)-(K) (grounds for divorce, none of which involve procreative ability or desire); Tenn. Code Ann. § 36-4-101 (a)(2)-(15) (listing the many non-procreative grounds for divorce).

no-fault ground for divorce.[16] No-fault divorce is premised on the notion that the spouses can end their marriage based on the breakdown of the spousal relationship, without having to prove fault or misconduct.[17] Many states, including Michigan and Kentucky, have gone even further, repealing all fault-based grounds and enacting only no-fault grounds.[18] In every state, a marriage can be dissolved when the personal relationship between the adults is over.

All these state laws illustrate that furthering the committed union between two individuals is a fundamental purpose of marriage. These laws enable the couple to make a particular "expression[] of emotional support and public commitment" and entitle the couple to "the receipt of government benefits" that help sustain the commitment. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). The support and protections that a couple receive from the state's acknowl-

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[16] *See Waite v. Waite*, 64 S.W.3d 217, 240 (Tex. App. 14th Dist. 2001) (recognizing that "[e]very state in the country has some form of no-fault divorce statute").

[17] *See, e.g., id.*; *see also Mahle v. Mahle*, 500 N.E.2d 907, 909 (Ohio Ct. App. 1985) (living separately for one year is meant to be a "no- fault" divorce remedy, foreclosing the applicability of fault-oriented defenses); *see generally* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U.L. Rev. 1669, 1670 n.5, 1704 (2011) ("'No-fault divorce' means that a divorce can be obtained solely on the basis of the breakdown of the marital relationship without a showing of fault or misconduct.").

[18] *See, e.g.*, Ky. Rev. Stat. § 403.025 ("irretrievable breakdown of the marriage" only standard for dissolution); Mich. Comp. Laws § 552.6 ("breakdown of the marriage relationship" only standard for divorce).

edgment of their private and personal union can enhance a couple's emotional well-being and enable them to enjoy a greater level of personal stability. "Responsibilities, as well as rights, enhance the dignity and integrity of the person." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

B. State laws demonstrate that procreation is not the defining purpose of marriage.

Ban defenders' insistence that marriage is inextricably intertwined with procreation is simply wrong. An ability, desire, or promise to procreate is not, and has never been, a prerequisite for a valid marriage in any state.[19] States permit different-sex couples to marry regardless of procreative ability or desire. Because procreation is neither an essential requirement of marriage nor its sole or primary purpose, the states' asserted interest in limiting marriage to those who may procreate cannot justify the ban. *See Turner*, 482 U.S. at 95 (unconstitutional to deny right to marry when "important attributes of marriage remain").

No state requires couples to prove their fertility in order to enter a valid marriage. In Kentucky, Michigan, Ohio, and Tennessee, the only requirements for marriage are that the person be unmar-

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[19] *In re Marriage Cases*, 183 P.3d 384, 431 (Cal. 2008) ("[M]en and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry.").

ried, at the age of consent, marrying someone who is not a close relative, and capable of giving consent.[20] Indeed, these states do not even require sexual intimacy to enter into or validate a lawful marriage.

Moreover, absent fraud, once a couple is married, the very common condition of infertility is not a basis for invalidating the marriage.[21] Likewise, lack of procreative desire, absent fraud, cannot justify annulment.[22]

Accordingly, no states prohibit elderly women from marrying—a class of people who, just like same-sex couples, have *no* potential ability to engage in unassisted biological procreation with their spouse. No state prohibits the eleven million individuals and two million couples who suffer from infertility from choosing to marry.[23] And some states

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[20] *See, e.g.*, Ky. Rev. Stat. §§ 402.010 (close relative); 402.020(1)(b) (unmarried status), 402.030 (age of consent); Mich. Comp. Laws §§ 551.3 (close relative), 551.4 (close relative); 551.5 (unmarried status), 551.51, 551.103 (age of consent); Ohio Rev. Code § 3101.01(A) (age of consent, close relative and unmarried status); Tenn. Code Ann. §§ 36-3-101 (close relative); 36-3-102 (unmarried status), 36-3-105 (age of consent).

[21] *See, e.g.*, Ohio Rev. Code § 3105.31; *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930) ("The inability to bear children is not such a physical incapacity as justifies an annulment"); Brief *Amicus Curiae* Historians of Marriage.

[22] *See* 4 A.L.R.2d 227 §§ 2[a], 3[a] (Originally published in 1949) (listing U.S. cases in which the desire not to have children was considered grounds for annulment only in instances of fraud, if at all).

[23] *See* Michael L. Eisenberg, M.D. et al., *Predictors of not Pursuing Infertility Treatment After an Infertility Diagnosis:*

permit certain persons to marry only if they prove that they *cannot* procreate.[24] Because states support the freedom to marry for these other classes who cannot engage in unassisted procreation, the ban defenders' insistence that same-sex couples may be denied the freedom to marry due to their inability to engage in unassisted procreation makes no sense.

This Court has also recognized that procreation is not an essential element of marriage, and that the rights to marry and to procreate are distinct. In *Eisenstadt v. Baird*, this Court extended its conclusion in *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), that married couples have a constitutionally protected right to engage in non-procreative sexual intimacy to every individual, married or single, and indicated that "matters so fundamentally affecting a person as the decision whether to bear or beget a child" should be "free from unwarranted governmental intrusion." 405 U.S. 438, 453 (1971).

Examination of a Prospective U.S. Cohort, 94 Fertility & Sterility No. 6, 2369 (2010); *Surrogacy: A Brief U.S. History*, 3 Family and Society, Encyc. of Contemp. Am. Soc. Issues, 1182 (Michael Shally-Jensen ed., 2011).

[24] *See, e.g.*, Ariz. Rev. Stat. § 25-101(B) (proposed legislation) (first cousins may marry only if both are age 65 or older or if one is proven to be unable to reproduce); 750 Ill. Comp. Stat. Ann. 5 § 212(a)(4) (first cousins may marry only if both are age 55 or older or if one is permanently sterile); Ind. Code Ann. § 31-11-1-2(2) (first cousins may marry only if both are age 65 or older); Utah Code § 30-1-1(2)(a)-(b) (first cousins may marry only if age 65 or older, or, if between ages 55-65, one is unable to reproduce); Wis. Stat. Ann. § 765.03(1) (first cousins may marry only if female is age 55 or older or if one is permanently sterile).

The characterization of marriage as, essentially, a state-sponsored incentive program for different-sex couples and the fruits of their procreative sexual activity garners no support from state family laws or decisions of this Court. The ban defenders' limited view of the purpose of civil marriage demeans the relationship between spouses and ignores the multiple other personal and societal purposes marriage has always served. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse").

II. State Family Laws Recognize Multiple Ways To Establish Legal Parent-Child Relationships And Do Not Privilege Biological Parents Over Other Legal Parents.

State family laws provide many ways to establish a legal parent-child relationship. A biological or genetic connection to a child is one such means, but it is neither a necessary nor always a sufficient one. *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012) ("A biological parent is not necessarily a child's parent under [state] law."). Ignoring these state laws, ban defenders argue that it is permissible to exclude all same-sex couples from marriage because states have a strong interest in using marriage to facilitate "optimal parenting," which they define as married biological mothers and fathers providing "gender-differentiated" parenting. This argument is deeply flawed. In this Part, we show that state family laws do not always privilege biological parentage over other forms of parentage or limit marriage to couples who agree to parent only their own biological chil-

dren. In Part III, we demonstrate that an alleged interest in "gender-differentiated" parenting is contrary to state family law and constitutional principles.

A. State laws permit and protect non-biological parent-child relationships established through adoption, assisted reproduction, and other ties.

Kentucky, Michigan, Ohio and Tennessee, like all other states, recognize multiple bases for establishing legal parentage.

Every state has long had laws that facilitate the adoption of children by married couples or single adults who are not their biological parents. *See* Adoption Law & Practice, at ch. 1 (J.H. Hollinger ed. 1988 & supp. 2014). States permit stepparents to adopt their spouse's biological children.[25] All states recognize adoption "as the legal equivalent of biological parenthood," granting adoptive parents the same rights, privileges, and obligations as biological parents.[26] *Smith v. O.F.F.E.R.*, 431 U.S. 816, 844, n.51 (1977).

States also allow married couples to have children using donor genetic material and assisted re-

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[25] *See, e.g.*, Ky. Rev. Stat. § 199.470; Mich. Comp. Laws § 199.470; Ohio Rev. Code § 3107.081(E); Tenn. Code Ann. § 36-1-102(15)(B).

[26] *See, e.g.*, Mich. Comp. Laws § 710.60(2) ("No distinction between the rights and duties of natural progeny and adopted persons"); Ohio Rev. Code § 3107.15 (Adoptive parents are treated as equivalent "for all purposes" to other legal parents).

productive technologies. Every year, tens of thousands of couples have children as a result of assisted reproduction that involves donor eggs or sperm.[27] The states that have addressed assisted reproduction by statute or case law treat the resulting children as the legal children of both spouses.[28] Some states similarly recognize unmarried different- and same-sex couples as the legal parents of children conceived with donor gametes.[29]

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[27] *See* Centers for Disease Control and Prevention, Assisted Reproductive Technology (ART) Success Rates, *available at* http://www.cdc.gov/art/reports/index.html (CDC data reporting that in 2012 65,160 babies resulted from ART cycles, some of which included donor sperm in 2012; 19,847 of these children were born from donor eggs). Moreover, the CDC does not include artificial insemination in its definition of ARTs and does not keep records of donor inseminations so this data significantly underestimates the number of children born from donor genetic material.

[28] *See, e.g.*, Mich. Comp. Laws § 333.2824(6) ("A child conceived by a married woman with consent of her husband following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."); Ohio Rev. Code § 3111.95(A) (same); Tenn. Code Ann. § 68-3-306 (same).

[29] *See, e.g.*, 13 Del. C. § 8-703; N.H. Rev. Stat. Ann. § 168-B:2; Nev. Rev. Stat. Ann. § 126.670; N.M. Stat. Ann. § 40-11A-703; N.D. Cent. Code Ann. § 14-20-61; Wash. Rev. Code Ann. § 26.26.710; Wy. Stat. Ann. § 14-2-903; D.C. Code § 16-909(e)(1); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013); *In re Guardianship of Madelyn B.*, 98 A.3d 494, Nos. 2013-403, 2013-445, 2013-593, 2014 WL 2958752 (N.H. 2014); *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005); *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009).

States' parentage laws also privilege parental "relationships that develop within the unitary family" over biological relationships in some circumstances. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). All states presume that a husband is a legal parent of a child born to his wife during their marriage.[30] While rebuttable, this presumption has often withstood challenge when the husband (as a non-biological father) has had a caring and supportive parental relationship to the child.[31] States often estop husbands who are non-biological fathers from denying their parentage when continuation of that status is in the child's best interests.[32] And this

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[30] *See, e.g.*, June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 220 (2011) ("All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband, and many limit the circumstances in which it can be rebutted." (footnotes omitted)).

[31] *See, e.g.*, *Boone v. Ballinger*, 228 S.W.3d 1, 10 (Ky. Ct. App. 2007) (husband's parental status upheld against biological father "in order to prevent the harm that inevitably results from the destruction of the bond that develops between a 'psychological father' and a child who was born during his marriage, and who has been raised as his own daughter or son"); *Leguillon v. Leguillon*, 707 N.E.2d 571, 579 (Ohio Ct. App. 1998) (rejecting "an interpretation of parentage that would place the genetic relationship of the parties above all other considerations"); *Atkinson v. Atkinson*, 408 N.W.2d 516, 517 (Mich. Ct. App. 1987) (wife estopped from denying former husband's status as child's legal father because he had always treated child as his); *Sinicropi v. Mazurek*, 729 N.W. 256, 264 (Mich. Ct. App. 2006) ("equities of the case" warranted protection of child's relationship and custody with ex-husband over proof that he was not the biological father).

[32] *See, e.g. Welch v. Welch*, 195 S.W.3d 72, 75 (Tenn. Ct. App. 2005) (non-biological father could not disclaim paternity

Court has recognized the constitutionality of state laws that allow a husband and wife to resist a biological father's challenge to the husband's presumed parentage. *Michael H. v. Gerald D.*, 491 U.S. at 123.

There are also other circumstances where many states recognize and protect parent-child relationships based on functional parenting, even in the absence of a marital or biological connection.[33]

In addition to the circumstances where a biological or genetic tie is unnecessary to establish parentage, there are others where the existence of a biological or genetic tie is insufficient to give rise to a legal parent-child relationship. Consistent with this Court's decisions concerning unwed fathers,[34] state

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upon divorcing child's mother; Tennessee law "clearly rejects a bright-line rule" that genetic testing may automatically relieve a legal father of his obligations).

[33] *See Picklesimmer v. Mullins*, 317 S.W.3d 569 (Ky. 2010); *In re Mullen*, 953 N.E.2d 302 (Ohio 2011); *In re Nicholas H.*, 46 P.3d 932, 933 (Cal. 2002); Unif. Parentage Act § 204(a)(5) (providing that a man is presumed to be a child's legal parent if "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."). At least 19 states have enacted the original UPA, while others have enacted significant portions of it. *See* Uniform Parentage Act of 2002, Prefatory Note. Nine states have enacted the Revised UPA, promulgated in 2002. *See* Uniform Law Commission, Parentage Act, http://www.uniformlawcommission.com/Act.aspx?title=Parentage%20Act.

[34] *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978) (best interests standard for child in adoption proceeding does not violate Due Process rights of biological father who showed no commitment to parental responsibilities); *Lehr v. Robertson*, 463 U.S. 248, 261-62 & n.19 (1983) ("biological link" provides a

family laws make clear that "the mere existence of a biological link" is insufficient to merit protection of an unwed father's parental rights in proceedings where other adults are seeking to adopt his child. *See Lehr v. Robertson*, 463 U.S. 248, 261-62 & n.19 (1983).[35] In approximately half the states, an unwed biological father's consent to his child's adoption is not required unless he has filed a timely paternity claim with the State Putative Father Registry and developed a "substantial relationship" to the child.[36] In states without a Registry, unwed fathers cannot block an adoption unless they have lived with, cared for, paid child support for, or otherwise manifested a genuine parental interest in the child.[37]

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man the opportunity to "develop a relationship with his offspring," but if he fails to "accept[] some measure of responsibility for the child's future," he is not entitled to exercise parental rights or block the child's adoption).

[35] *Cf. Adoptive Couple v. Baby Girl*, 570 U.S. ___ (2013) (holding that a biological father who had never had legal or physical custody of his child cannot invoke the protections of the federal Indian Child Welfare Act to block the proposed adoption of his child).

[36] *See* Adoption Law & Practice § 2.04A.

[37] *See, e.g., In re Dearing*, 648 N.E.2d 57 (Ohio 1994), review denied, 646 N.E.2d 467 (1995) (putative father who was notified of proposed adoption failed to file objection within 30 days required by Ohio statute and lost his right to challenge adoption).

B. State laws do not privilege biological parent-child relationships over other types of legal parent-child relationships.

The ban defenders contend that the marriage ban is necessary so that marriage can serve as the ideal setting for biological parenting by opposite-sex parents. As Michigan put it in the proceedings below: "It is certainly within the realm of rational speculation to believe that ... it is beneficial for children to have a biological connection to both of their parents." Brief for Michigan Defendants-Appellants at 40-42, *DeBoer v. Snyder*, 772 F.3d 388 (No. 14-1341) (6th Cir. 2014). Limiting marriage to opposite-sex couples, the argument goes, "reinforces the idea" that biological parents are best for children. *Id.*

In light of the range of circumstances in which states permit non-biological parenting, this argument is baffling. Whether same-sex couples may marry or not, marriage will remain an institution in which couples raise biological children, non-biological children, or no children at all.

Indeed, the states could not expressly limit marriage to "model" biological parents. In *Eisenstadt*, this Court made clear that "matters so fundamentally affecting a person as a decision whether to bear or beget a child" should "be free from unwarranted governmental intrusion." 405 U.S. at 453. Conditioning marriage on biological parenting is just such an unwarranted governmental intrusion. By permitting and facilitating non-biological parenting both inside and outside of marriage, the states have made clear that an interest in encouraging "optimal" parenting

by children's biological parents cannot justify the marriage bans.

III. State Marital, Parentage, And Custody Laws Have Abandoned Gender Distinctions And Do Not Privilege "Gender-Differentiated" Parenting.

Since the mid-19th century, states have gradually removed the "baggage of sexual stereotypes" from marriage. *Orr v. Orr*, 440 U.S. 268, 283 (1979). Marriage used to be an institution replete with state imposed gender- and sex-specific roles and responsibilities addressing, for example, property ownership, employment, wages, and childrearing.[38] Today, the laws governing marriage are free of state-mandated gender norms in nearly "every respect *except* the requirement that would-be spouses be of different genders." *Latta v. Otter*, 771 F.3d 456, 485-90 (9th Cir. 2014) (Berzon, J., concurring). Similarly, state family laws no longer allow courts to rely on stereotypical notions that a parent's sex or gender is legally relevant to child custody determinations or to the allocation of child support obligations.

Swimming against the tide of this transformation, ban defenders suggest that the marriage exclusions can be justified by the states' interest in encouraging children to be "raised by both a mother and a father," each performing distinct sex-based roles. Brief for Michigan Defendants-Appellants at 40, *DeBoer v. Snyder*, 772 F.3d 388 (No. 14- 1341) (6th Cir. 2014). This is best for children, the ban de-

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[38] *See infra* pp. 19-24.

fenders argue, because mothers and fathers bring different abilities to the parenting enterprise. Mothers, they argue, "tend to be more emotion focused, while fathers, in turn, are more playful and a little bit more task-oriented." *Id.* at 42 (internal quotation marks omitted). This asserted interest in "optimal parenting" relies on the very gender stereotypes about parents that the states have abolished, conflicts with social science research and constitutional principles, and is belied by the states' failure to exclude any other alleged "non-optimal" parents from marriage.

A. States have abandoned marital, parentage, and custody laws based on gender stereotypes.

Under the laws of every state, marriage has gradually evolved to become a union free of state mandated sex- or gender-specific roles. Since the mid-19th century, state legislatures and courts have progressively eliminated the once prevalent sex-specific laws regulating entry into marriage, allocating marital roles, establishing the consequences of divorce, and determining child custody and support.

Kentucky, Michigan, Ohio, and Tennessee have all participated in this transformation. Every state has removed gender-based distinctions that once defined the marital relationship under the now-abolished doctrine of coverture.[39] State laws now

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[39] Mich. Comp. Laws §§ 557.21–557.28 (established in 1844 as the Married Women's Property Acts, which became the Rights and Liabilities of Married Women Act of 1981,

acknowledge that both husbands and wives have the right to retain their own earnings, manage their jointly owned marital or community property, and control their separate property.[40] Even states like Ohio that retain the common law doctrine of necessaries, which, historically, obligated only the husband to pay creditors for his wife's necessaries, have made that obligation gender-neutral.[41]

Like other states, Kentucky, Michigan, Ohio, and Tennessee have also eliminated traditional gender-based distinctions upon divorce or the death of a spouse. The grounds for obtaining a divorce are the same for each spouse, and either spouse may initiate

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protecting married women's property, earnings, and full contract rights, as if unmarried); Mich. Const. art. X, § 1 (1963 edit officially abolished coverture); Tenn. Code Ann. § 36-3-504 (established in 1919 as the Married Women's Act, permitting married women separate and full rights in real estate as if unmarried); Ky. Rev. Stat. §§ 404.020–404.030, 404.060 (established in 1894 as the Weissinger Act, and amended in 1942, granting married women the right to acquire, hold, and dispose of real and personal property, to contract, sue, and be sued as if unmarried); *see also People v. Wallace*, 434 N.W.2d 422, 428 (Mich. Ct. App. 1988) (married women now have property rights "free from their husbands' interference"); Ohio Rev. Code §§ 3103.04, 3103.07, 3103.08, 2307.09 (various equal and separate spousal legal and property rights); Ohio Rev. Code § 3105.18(C)(2) (both spouses are considered to have contributed equally to the production of marital income); *Preston v. Smith*, 293 S.W.2d 51, 57 (Tenn. Ct. App. 1955) ("[M]arriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition or disposition of property of any sort.").

[40] *Id.*

[41] *See, e.g.*, Ohio Rev. Code § 3103.03 (doctrine of necessaries applies to both spouses).

a dissolution action.[42] Upon divorce, states treat the marriage as an economic partnership subject to the court's distribution of the spouses' accumulated assets as the equities of each case require, without regard to gender.[43] Either party can seek spousal support or "maintenance," as determined on the basis of their needs, not their sex.[44] In every state, married spouses have a right of intestate succession regardless of gender,[45] and, except for Georgia, surviving spouses—without regard to gender—are entitled to some kind of elective or forced share of the decedent-spouse's property.[46]

The principle of equal rights and responsibilities for both spouses applies equally to their roles as parents. In the past, gender-specific family laws like the "tender years doctrine," presumed that mothers were entitled to custody of young children because they were "naturally" nurturing.[47] *See Pusey v. Pu-*

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[42] Ky. Rev. Stat. §§ 403.140, 403.170; Mich. Comp. Laws § 552.11; Ohio Rev. Code § 3105.01; Tenn. Code Ann. §§ 36-4-101, 36-4-103.

[43] *See, e.g.*, Ky. Rev. Stat. § 403.190; Mich. Comp. Laws §§ 552.18, 552.19; Ohio Rev. Code § 3105.18; Tenn. Code Ann. §§ 36-5-101, 36-4-121.

[44] *See, e.g.*, Ky. Rev. Stat. §§ 403.160, 403.200; Mich. Comp. Laws §§ 552.13, 552.23; Ohio Rev. Code § 3105.18(C); Tenn. Code Ann. § 36-5-121.

[45] *See, e.g.*, Ky. Rev. Stat. § 391.010(4); Mich. Comp. Laws § 700.2102; Ohio Rev. Code §§ 2106.01, et seq.; Tenn. Code Ann. § 31-2-104.

[46] Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. Davis L. Rev. 129, 160 (2008).

[47] *See, e.g.*, *Krieger v. Krieger*, 81 P.2d 1081, 1083 (Idaho 1938) (the maternal preference "needs no argument to support it because it arises out of the ... instincts of motherhood; nature

sey, 728 P.2d 117, 119-20 (Utah 1986) (rejecting the "tender years presumption" as based on "outdated stereotypes").

Today, both parents are equally responsible for the care and support of their children, and, upon separation or divorce, the standards for child custody determinations are gender-neutral. The prevailing legal standard for determining child custody is the broadly defined and gender-neutral "best interests of the child" standard. This standard grants trial courts discretion to "liberally construe" a long list of specific child-centered factors relevant to the circumstances of each case.[48] Many appellate courts have overruled trial court determinations that depart from these factors in favor of lingering gender-role stereotypes.[49]

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has ordained it"); *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938) ("There is but a twilight zone between a mother's love and the atmosphere of heaven.").

[48] Michigan's comprehensive Child Custody Act of 1970, 1970 PA 91, Mich. Comp. Laws § 722.21 *et seq.*, has been a model for the statutory reforms in many other states. *See also* Ky. Rev. Stat. § 403.270; Ohio Rev. Code §§ 3103.03, 3109.03, 3109.04 (both parents have equal rights and responsibilities as to the care and custody of their children; parent's gender is legally irrelevant); Tenn. Code Ann. § 36-6-101(d) (2001) (gender cannot "constitute a factor in favor or against the award of custody").

[49] *See, e.g.*, *Ireland v. Smith*, 547 N.W.2d 686 (Mich. 1996) (noting that young child was thriving in mother's care and reversing order transferring custody to father based on trial court's personal view that there is "no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, can do justice to their studies

State and federal child support laws and guidelines also apply equally to both parents. In every state, either or both parents may be liable for child support, based on the child's needs and parental resources and without regard to the parents' gender or marital status.[50]

The elimination of sex- and gender-based distinctions in family laws described here is attributable, in part, to decades of social science research. This research demonstrates that a child's adjustment, school performance, peer relations, cognitive functioning, and self-esteem is "best accounted for by variations" in the "the quality of the relationship between the parents or significant adults in the children's and adolescent's lives, and the availability of economic and socio-economic resources."[51] As detailed further in the Brief *Amicus Curiae* American Sociological Association, these studies make clear that the "parents' sex and sexual orientation ... do

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and to raising of an infant child." (citation omitted)); *see also Linda R. v. Richard E.*, 162 A.D.2d 48 (App. Div. 1990) (reversing custody order to father where trial court expected mother, but not father, to give priority to child over career).

[50] *See* Laura W. Morgan, Child Support Guidelines: Interpretation and Application § 1.07 (2d ed. 2013); Ky. Rev. Stat. § 403.212; Ohio Rev. Code §§ 3103.03, 3109.03, 3109.04; Mich. Comp. Laws § 552.605; Tenn. Code Ann. § 36-5-101. The federal Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988), also applied a support obligation to both parents.

[51] Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98-111 (2012).

not affect either the capacity to be good parents or their children's healthy development."[52]

B. State laws do not and cannot limit marriage to those who parent according to prescribed gender norms.

Beyond relying on the same discredited sex and gender stereotypes about women and men having different parental abilities, the ban defenders' asserted interest in "optimal" gender-differentiated parenting cannot support the ban for at least two additional reasons: (1) states do not limit marriage to those who can satisfy specific parental norms, and (2) any effort to enforce gender-differentiated roles in marriage or parenting would be unconstitutional.

1. States do not limit marriage to those who satisfy specific parental norms.

The exclusion of same-sex couples from marriage because they allegedly cannot satisfy gender-based parental norms, also "[makes] no sense in light of how [states] treat[] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985)). States deny no other couples the right to marry based on a belief that they will provide a suboptimal setting for raising children. No state requires applicants for a marriage license to prove their ability to parent or to pledge to raise their children in accordance with state-prescribed childrear-

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[52] *Id.*

ing standards.[53] Likewise, no state excludes impoverished couples from marriage, despite the fact that parental resources strongly correlate with better outcomes for children.[54] *Cf. Varnum v. Brien*, 763 N.W.2d 862, 900 (Iowa 2009) (noting that, except for same-sex couples, states do "not exclude from marriage ... child abusers, sexual predators, parents neglecting to provide child support, and violent felons—[groups] that are undeniably less than optimal parents").[55]

Excluding same-sex couples from marriage and its attendant legal protections because they allegedly do not provide a certain kind of parenting imposes an unjustified burden on same-sex couples. This is especially so because different-sex couples are not required to have children at all, much less prove

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[53] The Michigan defendants conceded this point at the trial court hearing:

> As defendant Lisa Brown testified, Michigan county clerks are not authorized to consider a couple's stability, criminal record, ability to procreate, parenting skills, or the potential future outcomes of their children before issuing a marriage license. County clerks may only evaluate the age and residency of the license applicants and whether either of the applicants is currently married.

DeBoer v. Snyder, 973 F. Supp. 2d 757, 764 (E.D. Mich. 2014).

[54] *See supra* note 52 and accompanying text.

[55] It would also be unconstitutional to limit marriage in this way. As this Court long ago recognized in *Zablocki v. Redhail*, it is impermissible to condition the right to marry on the adequate performance of parental responsibilities. 434 U.S. 374, 386, 388-89 (1978) (unconstitutional to condition marriage on payment of outstanding child support).

their parental fitness. A desire to mark the relationships and parenting abilities of same-sex couples as less worthy of respect is an impermissible interest, under any standard of constitutional review. *Windsor*, 133 S. Ct. at 2695-96. Accordingly, it is hardly surprising that the Court of Appeals in this case and courts throughout the country have overwhelmingly rejected the optimal parenting argument, recognizing that "the capacity to raise children ... turns not on sexual orientation but on individual choices and individual commitment." *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014).[56]

2. States cannot enforce gender-based parental norms.

Beyond its inconsistency with state family laws, any effort to enforce gender-based roles in marriage or parenting would be unconstitutional. The ban defenders' claims about the "unique relational roles" that men and women play in the development of their children, including that women are better at "nurturing," while fathers are more "task-oriented," *see supra* p. 18, are precisely the type of "overbroad generalization[s] about the different talents, capaci-

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[56] *See, e.g.*, *Wolf v. Walker*, 766 F.3d 648, 667 (7th Cir. 2014); *Latta*, 771 F.3d at 476; *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2013); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 770 (E.D. Mich. 2014) (noting that over 150 sociological and psychological studies have repeatedly confirmed that there is no scientific basis to differentiate between children raised in same-sex versus heterosexual households); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), *reinstated in Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

ties, or preferences of males and females" that the Constitution prohibits, *United States v. Virginia*, 518 U.S. 515, 533 (1996), even when the generalization "is not entirely without empirical support," *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). *See, e.g., Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating state law that gave husbands the unilateral right to dispose of jointly owned community property without wives' consent); *Weinberger*, 420 U.S. at 652 ("a father, no less than a mother, has a constitutionally protected right to the [custody and care]" of their children); *Orr*, 440 U.S. at 279-280 (rejecting state alimony statutes that used "sex as a proxy for need" in order to announce "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role."); *Califano v. Goldfarb*, 430 U.S. 199, 205, 207 (1977) (invalidating Social Security provisions premised on the "archaic and overbroad" generalizations that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives"); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military benefits for service member's dependents must be calculated the same for men and women).[57]

This Court has also invalidated sex-specific distinctions in state parentage laws. *See, e.g. Stanley v. Illinois*, 405 U.S. 645, 653, 657 (1972) (striking down state law that conclusively presumed that all unmarried fathers were "unqualified to raise their chil-

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[57] *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that "private biases and the possible injury they might inflict" are not permissible considerations in a custody dispute).

dren"); *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) (rejecting the claim that "any universal difference between maternal and paternal relations at every phase of a child's development" justified sex-based distinctions in adoption laws). Other courts have similarly ruled. *Accord Ex parte Devine*, 398 So. 2d 686, 695-96 (Ala. 1981) ("[T]he tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.").

Any state effort to ensure that children will be socialized into gender roles that are allegedly appropriate for their biological sex would also be impermissible. *See Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); *see also Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (rejecting "outmoded assumptions" that only women should be nurses). In addition, the powerful common-law traditions—bolstered by constitutional decisions—that protect the rights of parents to control the care and socialization of their children prohibit states from requiring parents to parent in an "optimal" way. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

IV. State Family Laws Recognize That It Is Impermissible To Punish Children To Influence The Behavior Of Adults.

As family law scholars, *Amici* are committed to ensuring the well-being of all children. The marriage bans, by design and operation, violate the basic tenet of family law that all children should be treated with equal dignity regardless of who their parents are. The bans deprive children of same-sex couples of the potentially stabilizing effects of marriage, including important governmental benefits and the feeling of self-worth that comes from knowing that their parents' relationship is equally worthy of "recognition, dignity, and protection." *Windsor*, 133 S.Ct. at 2692.

As explained in Brief of Petitioners at 50, *Tanco v. Haslam* (No. 14-562), it is utterly implausible to believe that barring same-sex couples and their children from marriage improves the well-being of children raised by different-sex couples. But even if such laws achieved some social good, punishing innocent children is an impermissible and unconstitutional means of trying to influence the behavior of adults. It is also contrary to the basic goals of every state's family laws.

A. State laws reflect that it is impermissible to punish children to influence parental behavior.

Historically, state parentage laws saddled the children of unwed parents with the demeaning label "illegitimate" and denied these children important rights in an effort to encourage childrearing within

marriage. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage."); Melissa Murray, *Marriage As Punishment*, 112 Colum. L. Rev. 1, 33 n.165 (2012) (marriage was offered as a way to lead unwed mothers away "from vice towards the path of virtue"). These laws denied nonmarital children the right to a relationship with and support from their fathers, intestate succession, and compensation for their parents' wrongful death or injury solely because of the circumstances of their birth. *See Trimble v. Gordon*, 430 U.S. 762, 768 (1977) (recognizing "harsh common-law rule under which an illegitimate child was filius nullius").

Since the late 1960s, however, this Court has recognized that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175. Because "no child is responsible for his birth ... penalizing the illegitimate child is ... an unjust[] way of deterring the parent." *Id.*; *see also Levy v. Louisiana*, 391 U.S. 68, 71 (1968) ("Why should the illegitimate child be denied rights merely because of his birth out of wedlock?").

Consistent with this directive, state family laws no longer support the proposition that it is permissible to deny critical benefits and security to nonmarital children in order to influence parents to procreate within marriage or to provide more benefits and security to the children of married couples. States now recognize that children of unmarried parents are entitled to the same rights as children born to married

parents.[58] Children born to unmarried parents have the same inheritance rights as children born to married parents when paternity has been established.[59] In custody disputes, state courts consider the same factors for determining the best interests of nonmarital and marital children.[60] And states impose child support and other parental obligations on all parents regardless of their marital status.[61]

B. The marriage bans punish children raised by same-sex couples.

The marriage bans function in a way that is remarkably similar to the now-repudiated laws that

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[58] *See, e.g.*, Unif. Parentage Act § 202 (2001 & Supp. 2010) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."); Ohio Rev. Code § 3111.01(B) ("the parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents"); Tenn. Code Ann. § 36-2-316.

[59] *See* Unif. Parentage Act § 202; Ky. Rev. Stat. § 391.105; Mich. Comp. Laws § 700.2114; Ohio Rev. Code § 3111.01; Tenn. Code Ann. § 36-2-316.

[60] *See, e.g.*, *Basham v. Wilkins*, 851 S.W.2d 491 (Ky. Ct. App. 1993) (though Kentucky hasn't adopted the UPA, the "'best interests of the child' standard applies in determining custody of children born out of wedlock and gone is our preference for the mother of the illegitimate child"); Mich. Comp. Laws § 722.21 *et seq.*; Ohio Rev. Code § 2151.231; *S. Ry. Co. v. Sanders*, 246 S.W.2d 65, 66 (Tenn. 1952) (statutes regarding rights of nonmarital children were enacted "solely for the purpose of fixing the status of natural children").

[61] *See Gomez v. Perez*, 409 U.S. 535 (1973) (denying nonmarital children the opportunity to obtain paternal support violates equal protection).

stigmatized and denied legal and economic protections to children born out-of-wedlock.

The bans harm the children of same-sex couples by denying their families access to hundreds of state and federal benefits that may be conducive to providing stable and secure environments for raising children. The plight of the *DeBoer* plaintiffs, who have been unable to jointly adopt their children, clearly illustrates these harms. Because, like a number of states, Michigan prohibits joint adoption unless a couple is married,[62] and Ohio and Kentucky limit stepparent adoptions to married couples,[63] these states deny children of same-sex couples all the benefits that follow from a legal parental relationship: the right to have medical decisions made by both parents,[64] the right to child support from both parents,[65] the right to inheritance and Social Security benefits,[66] and the right to bring a wrongful death suit to name but a few.[67]

Moreover, the bans deny children of same-sex couples the same stable family structure that the

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[62] Mich. Comp. Laws §§ 710.24(1)-(2).

[63] Ky. Rev. Stat. § 199.470(2); Ohio Rev. Code §§ 3107.03(D)(1).

[64] *See, e.g.*, Ky. Rev. Stat. § 311.631; Tenn. Code Ann. §§ 36-6-101, 36-6-103.

[65] *See, e.g.*, Ky. Rev. Stat. 405.020; Tenn. Code Ann. § 36-5-101.

[66] *See, e.g.*, Ky. Rev. Stat. § 391.010 *et seq.*; Mich. Comp. Laws §§ 700.2103; Ohio 2105.06 (until 3/23/15); Tenn. 31-2-105.

[67] *See, e.g.*, Ky. Rev. Stat. § 411.130; Mich. Comp. Laws § 600.2922; Ohio Rev. Code § 2125.02; Tenn. Code Ann. § 20-5-106.

states themselves assert to justify the ban. The bans categorically exclude children of same-sex couples from the rights and protections intended to promote the security of families and assist them in times of crisis. Because all children and adolescents do better psychologically when their parents are emotionally secure and supported, the categorical exclusion of same-sex couples from marriage and its protections deprives children of same-sex couples of these stabilizing forces. Indeed, Michigan recognized as much in the proceedings below when it conceded that "extending the boundaries of marriage (for example, to same-sex couples) might give some children being raised in those arrangements more stability." Brief for Michigan Defendants-Appellants at 46, *DeBoer v. Snyder*, 772 F.3d 388 (No. 14-1341) (6th Cir. 2014).

The marriage bans are an official statement "that the family relationship of same-sex couples is not of comparable stature or equal dignity" to that of married couples. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008). This stigma leads children to understand that the state considers their gay and lesbian parents to be unworthy of participating in the institution of marriage and devalues their families compared to families headed by married heterosexuals. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003). The bans implicitly and inherently signal to children that the state thinks their families are inferior.

Whether defended as an effort to increase procreation, encourage biological, "gender-differentiated" parenting, or to foster stable environments for children, the marriage bans all have

the same effect: They deprive children of benefits in order to influence the behavior of others. This Court declared such policies "unjust" in the illegitimacy cases. *Weber*, 406 U.S. at 175. It should likewise recognize the unjust effects the marriage bans have on same-sex couples and their children.

CONCLUSION

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